IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12071 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAHID HABIBHAI SHIPAI

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR HH PATEL, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 07/02/2001

ORAL JUDGEMENT

#. This petition under Article 226 of the Constitution at the instance of the petitioner-Jahid Habibbhai Shipai, detenu, at present detained in Ahmedabad Central Prison, Ahmedabad, is directed against the order of the Police Commissioner, Rajkot City, dated 29th August, 2000,

whereunder he was ordered to be detained by that officer in exercise of powers under Section 3(2) of the Gujarat Prevention of Antisocial Activities Act, 1985 (hereinafter referred to as `Act') as a `dangerous person'.

#. The learned counsel for the petitioner raised manifold contentions challenging the legality, propriety and correctness of the order aforesaid but as this petition deserves acceptance only on one ground, it is not necessary and also in the larger interest of saving the precious and valuable judicial time of this court to refer all those contentions, discuss and give findings thereon.

#. It is contended that the respondent - detaining authority has not supplied to the petitioner, the statements of witnesses which are recorded u/s.161 of the Criminal Procedure Code, 1973. It is stated in paragraph-14 of the special civil application that the petitioner made this demand through his father in the representation dated 7.11.2000 for supply of statements of witnesses recorded u/s.161 of CR.P.C. but till date, copies of those statements have not been supplied. The learned counsel for the petitioner submits that the statements of witnesses recorded under Section 161 of CR.P.C. are vital documents and non supply of the same to the detenu results in depriving him his valuable right of making effective representation to the authorities.

#. In contra, the learned counsel for the respondents supported the order passed by the Police Commissioner of Rajkot City, Rajkot.

#. Reply to the special civil application is filed today in the court. The affidavit is of Mr.J.R.Rajput, Under Secretary to the Government of Gujarat, Home Department (Special), Sachivalaya, Gandhinagar. It is to be noticed that this officer of the State of Gujarat, an impersonal machinery, felt contended and satisfied by not giving para-wise reply to the special civil application. It is for the information to be stated that where the factual averments made by petitioner in the petition are not specifically denied by respondents, same are to be taken to be correct and the State of Gujarat may be in a fix in many of the cases of this category. It is always advisable that para-wise replies are given rather than to file a sketchy, short affidavit. It is not the stage where the respondent-State of Gujarat is opposing admission of this special civil application. It has filed this reply at the stage when the matter has already

been admitted. Once the matter has been admitted, the respondents are not to feel shy of filing detailed reply to the special civil application. There should not have been any hesitation on the part of the State of Gujarat to file a detailed reply to each and every paragraph of the special civil application. The detaining authority has not cared to file reply to the special civil application and if we go by the rule of pleadings the facts stated in the petition stand uncontroverted and are to be taken to be correct.

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

#. In the affidavit, the deponent Mr.J.R.Rajput, Under Secretary to the Government of Gujarat, Home Department (Special), Sachivalaya, Gandhinagar, submitted that the Commissioner of Police, Rajkot City has given reply to the detenu vide his letter dated 20.11.2000 regarding his demand of supply to certain documents. Copy of the reply of the Commissioner of Police, Rajkot City to the representation of the petitioner has not been filed or annexed to the affidavit-in-reply. It is stated that the copy of the reply was sent to the detenu on 20.11.2000. There is no proof that a copy of this reply of the Commissioner of Police, Rajkot City was given to the petitioner by jail authority. All the orders, communication or other correspondence which are sent to the detenu are served upon him through the jail authority. The jail authority has to take receipt of delivery of the letter, document, order, material or correspondence. This petition has been filed by the petitioner in the court on 23.11.2000. There are all possibilities that this letter of Commissioner of Police, Rajkot City, would not have been served upon the petitioner before the aforesaid date. In the absence of the document produced by respondent, it is difficult to believe that the reply of the Police Commissioner, Rajkot City, to the representation of the father of the petitioner has been received by the petitioner. It is well settled and accepted principle of law of evidence that to prove a fact where a documentary evidence is available, that evidence has to be produced. In this case, the documentary evidence which would have been available and if it is correct, what it is stated by the respondent-State, should have been available, but that evidence has not been produced and this court legitimately can draw an adverse inference that in case the documentary evidence would have been produced, it would have gone against the State of Gujarat. In the detention matters, heavy burden lies upon the State of

Gujarat to prove its case. In this matter, we cannot go by the rule of burden of proof. The State of Gujarat has to satisfy that the order passed for detention of the detenu is perfectly legal and justified. This burden which the State Government owes has not been discharged in the present case.

There is yet another reason not to believe what it is stated that the reply to the representation of the father of the petitioner was sent to the petitioner by Police Commissioner, Rajkot city. The affidavit-in-reply has been verified by the deponent as under:

> "What is stated hereinabove is true to the best of my knowledge, belief and information derived from official record and I believe the same to be true".

There are three paragraphs in this affidavit. The deponent has not clearly verified whether the statement made by him in paragraph-3 of the affidavit is true to his knowledge, or belief or information. This is a vague affidavit and on which no reliance can be placed. This fact as such even if taken to be true on the basis of information derived by this deponent from the official record, still it is of little help to the respondent as the primary document available has not been produced to prove this fact.

#. The detaining authority, as stated above, has not filed reply to the special civil application. It is not the case of respondent-State of Gujarat that the statements of witnesses were not recorded in the criminal cases u/s.161 of CR.P.C. Similarly also, it is not the case of the detaining authority as well as of the State of Gujarat that the statements of witnesses recorded in all these twelve complaints under Section 161 CR.P.C. were not the part of the material which has been placed before the detaining authority for forming his opinion to order detention of the petitioner u/s.3 of the Act. The documents which are placed for consideration of the detaining authority for forming opinion for detention of a person under any of the categories, copies thereof are not given to the detenu, will certainly affect his valuable right of making effective representation against detention to the authorities. The copies of the entire material which is considered for forming the opinion for detention of a citizen are to be given to the detenu concerned. No discretion does vest with the authority to give only part of the material used against the detenu. However, here we are not concerned with those documents

in respect of which the detaining authority may claim privilege under sub-section 2 of section 9 of the Act. It is not the case of the respondents that the copies of the documents demanded by petitioner were privilege documents and copies thereof could not have been given to him. This is to be mentioned and I consider it to be necessary to mention it so that this decision may not be taken to be a decision given in respect of the documents in respect of which the detaining authority may claim privilege under Section 9(2) of the Act.

#. A larger question does arise for consideration is that whether a detenu has a right to get the copies of those documents which are not part of the material which has been produced before the detaining authority to decide to pass the order of detention of that person. This question is to be considered with reference to two aspects. One is the documents which have no relevance whatsoever in the matter, and second, the document which have relevance with the matter. So far as the first category of documents is concerned, suffice to say that the demand of the copies thereof by the detenu may not be justified. So far as second category of documents is concerned, these documents have relevance to the matter in issue and where the detenu considers the copies of those documents necessary for making effective representation against detention order, a question arises whether it is his right to make such a demand and a corresponding obligation on the part of the detaining authority to give copies thereof to him.

##. The petitioner has been detained as a `dangerous person'. From the grounds of detention, it is clear that there are as many as eleven registered criminal cases against him. Out of these eleven cases, it further comes out from the grounds of detention that eight cases are pending in the court and three cases are at the stage of investigation. In eight cases where chargesheets have already been submitted against the petitioner, it has to be taken that statements of witnesses would have been recorded u/s.161 of CR.P.C. In three other matters pending investigation, there is all possibility that till the date of detention statements of the witnesses would have been recorded u/s.161 of CR.P.C. The incidental question which falls for consideration in this case is where chargesheet is submitted in criminal case, the accused has to be given a copy of the report submitted by police and in which statements of witnesses recorded u/s.161 of CR.P.C. would have been there and still the detenu can make a request for supply of copies of those documents. It is to be stated at the cost of repetition

that it is not the case of respondents that in all these eleven cases, statements of witnesses were not recorded u/s.161 of CR.P.C. In these facts, it is to be taken that in the criminal cases, reference of which has been made by respondent detaining authority in the grounds of detention of the petitioner, statements of witnesses u/s.161 of the CR.P.C. would have been recorded. These statements are recorded in the cases which have been taken and made use of for the detention of the petitioner as a `dangerous person' u/s.3 of the Act. The statements of witnesses may not form part of record which was placed for consideration and considered by the detaining authority but these are relevant and material for the detenu and he can make use of the same for his defence, i.e. to file representation. The petitioner-detenu can legitimately claim for the copies of these documents. These are relevant and vital documents in the case and non supply thereof certainly results in depriving the detenu his valuable right of making effective representation which is guaranteed to him under Article 22(5) of the Constitution.

##. The learned counsel for the respondents made a feeble attempt to satisfy the court that only those copies of documents are to be given to the detenu and the detenu may be justified to make a request for supply of copies of those documents which form part of the material which has been placed before the detaining authority and considered by him for forming opinion for ordering of detention of the petitioner. In support of this contention he has not referred any decision of this court or Hon'ble Supreme Court or any other High Court. I do not find any merits in this contention of the learned counsel for the respondents. Every document which has relevance to the material which has been used by the detaining authority for passing the detention order of the petitioner is a vital and material document for him and he has all the right to make a request to the respondents to furnish the copy of the same to him. These documents are not irrelevant. These documents are relevant to the material considered by the detaining authority and the detenu has all the right to make use of it for preparing his effective representation against the detention order.

##. Now, here, I may consider ancillary point which arises for consideration. In the cases where chargesheet have been submitted against the detenu in criminal court, it is true that the copies of the statements of witnesses recorded u/s.161 of CR.P.C. would have been furnished to him, but only on this ground, this right of the

petitioner to claim copies of these documents from the detaining authority cannot be denied. If such a course is adopted, there may be manifold difficulties in the way of the detenu to collect all these documents because in our system, those papers would have been with the advocate engaged by the detenu and to take those documents from the advocate would have been a time consuming factor. There is yet another patent difficulty with the detenu if this course is made applicable in his case. Firstly, he is in jail and it is difficult for him to collect this material from his advocate. Secondly, when he approaches the advocate, he may have pretext here and there not to give those documents so that the detenu has to come to the compromise and engage him for filing representation in detention matter. I have seen cases after cases wherein the detenus have filed their representations against the detention order through the advocates. To make representation against detention order, the detenu may not need the assistance of an advocate. However, in substantial number of cases, I have seen that representation against detention are being made either by the detenu himself or through his relations. The detention order results in deprival of, may be temporarily, liberty to the detenu, where the authority decides to detain him for his activities, certainly he can legitimately make demand for supplying him copies of all vital and the relevant documents. The detaining authority is under a legal obligation to supply the copies of all those documents which are vital and relevant to make an effective representation against the detention by the detenu. Relevance and vitality of a document to certain extent has to be decided by the detenu and not by the detaining authority. However, where documents demanded are wholly irrelevant or unconcerned to the matter, then in that case, the detaining authority may be justified to decline this request of the detenu. In such case where the request is made for supply of copies of the documents by the detenu and the detaining authority considers that copies of those documents cannot be given to him, a reasoned order is expected from it, that is to say, to give reasons in support of that order. This reasoned order will serve twofold purposes. If the detenu is satisfied with the reasons given, he may not pursue the matter further and as a result of which, it will save him from expenses of litigation as well as the State Government. Secondly, where the matter is taken up before this court, the court will be in a better position to appreciate the matter and in many cases may not call the respondent with the record or reply. To sum up, it is made clear that the detenu is entitled for copies of the statements of witnesses

recorded u/s.161 of CR.P.C. in criminal cases which are taken into consideration by the detaining authority to detain him under the Act irrespective of the fact whether those statements are part of the material which has been placed before the authority for consideration and passing of the order of his detention. Secondly, copies of the statements recorded u/s.161 of CR.P.C. in criminal cases which are made use of for detention of the detenu under the Act even if in those cases, chargesheet is submitted in the court, the detenu has all the right to claim copies thereof from the detaining authority. Thirdly, where the detaining authority is not inclined to give copies of those documents (statements recorded u/s.161 of CR.P.C.) it has to record reasons in support of its decision.

##. In this case, the detaining authority has not given any reasons not to give copies of the statements of witnesses recorded u/s.161 of CR.P.C. in the criminal cases which are there against the petitioner made use of to detain him under the Act. Undisputedly, the copies of the documents demanded by the detenu have not been supplied to him and as a result of which the petitioner has been deprived of his valuable right to make effective representation against the detention order as guaranteed to him under Article 22(5) of the Constitution of India.

##. As a result of aforesaid discussion, this petition succeeds and the same is allowed and the order of detention of the petitioner dated 29.8.2000 is quashed and set aside. The petitioner - Jahid Habibbhai Shipai, the detenu, at present at Ahmedabad Central Prison, Ahmedabad, be set at liberty forthwith, if he is not required in any other case. Rule is made absolute. Though it is a fit case where costs have to be awarded to the petitioner, but the learned counsel for the petitioner states that she has rendered free professional services to the petitioner, no order as to costs.

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(sunil)